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U.S. COURTS

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO**

**KIMBERLEY SMITH and MICHAEL )  
B. HINCKLEY, individually and on behalf )  
of those similarly situated, )**

**Plaintiffs, )**

**vs. )**

**MICRON ELECTRONICS, INC., a )**

**Minnesota corporation, )**

**Defendant. )**

**Case No. CIV 01-0244-S-BLW**

**PLAINTIFFS' OPPOSITION TO  
MOTION TO STRIKE AND  
MOTION TO DISMISS**

Comes Now, counsel for Stefanie Bistline, Bland Ballard, Michael Moser, Rory Kip

DeRouen, Jeffrey Parrish, Michael Jordan, Michelle Milliken, Isaac Moffett, Christopher

McCullough, Eric Fillmore, Mathew Flynn, Jeffery Clevenger, Tim Hedding, John Seale,

Matthew Jarame Ell, Chris Wing and Kent Ford (hereafter Potential Class Members), and opposes Defendant's motion to Strike Consents and Dismiss Potential Opt-in Claimants.

1. Defendant's motion is addresses subpoenas served on Potential Class Members in August of 2000. Pursuant to this Court's order and the agreement of counsel, these requests were deemed Requests for the Production of Documents. Responses were filed September 14, 2001 on behalf of twenty-two of the Potential Class Members. Subsequently, Defendant served additional Requests for Production of Documents and Interrogatories on Plaintiffs. On November 19, 2001, Responses to Interrogatories and Responses to Requests for Production were served on Defendant on behalf of all plaintiffs and all persons having filed consents. Defendant has continued to complain, and complains in its motion, that some Potential Class Members have not provided documents in response to their subpoenas. Some Potential Class members have no documents in their possession or control responsive to the subpoenas. Other Potential Class Members searched for responsive documents in August and located none, but continue to locate documents in unexpected locations or due to unexpected circumstances such as moving ones household. No Potential Class Member should be subject to the ultimate sanction of dismissal with prejudice where Defendant is in no way prejudiced by a purported failure to respond given that other similarly situated Potential Class Members have responded to document requests and Interrogatory responses have been served on behalf of all. While Plaintiff's believe the motion should be dismissed outright, other alternatives such as an order to compel discovery and/or an order requiring someone who states they have no documents to file an affidavit stating those facts would better serve justice than dismissal with prejudice.

2. Some persons Defendant wishes to dismiss with prejudice have been deposed by

Defendant and/or have in fact produced documents, including Michael Moser, Jeffrey Clevenger, Jeffrey Parrish, and Isaac Moffett. In these depositions Defendant discovered that every single Potential Class Member had searched for documents in August, but had not been successful, it at all, until a much later date when they were, for example, packing their entire household to move to a new location.

3. Even for Bland Ballard, Matthew Flynn, and Michelle Milliken, who have either withdrawn their notice to opt-in or have given notice of that intention, dismissal without prejudice would be the most extreme sanction appropriate given the very early stage of this litigation. Despite the withdrawal of three consents, Defendant has the power to force Mr. Ballard, Mr. Flynn, or Ms. Milliken to appear for deposition as witnesses, and has expressly reserved that right prior to cancelling the deposition of Ms. Milliken and has yet to cancel Mr. Ballard's deposition despite such notice. Dismissal without prejudice for these three Potential Class Members would leave Defendant in the same position it is today, defending a class action with hundreds of potential class members, with dozens of potential class members already filing consents to opt-in.

4. Defendant's correspondence and demands attached to its motion ignore the discovery that has occurred, and most importantly ignore the possibility that Potential Class Member has an important and valid claim for hundreds of hours of overtime and the Defendant is in possession of all of the documents that support that claim. Justice cannot be served by the dismissal with prejudice of a claim because of the failure to produce documents where Defendant is in possession of documents and information supporting the claim.

**Law**

5. The pre-eminent case in the 9<sup>th</sup> circuit regarding dismissal of a case for discovery sanction is *Wanderer v. Johnston, et. al.*, 910 F.2d 652 (9<sup>th</sup> Cir. 1990). There the Court held:

Our own court has fashioned a set of factors for the district court to apply in considering whether a dismissal of default is appropriate as a Rule 37 sanction.


The court is to consider: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to [the party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Wanderer v. Johnston, et. al.*, 910 F.2d 652, 656 (9<sup>th</sup> Cir. 1990).

All of the factors weigh against dismissal. There has been no delay in the litigation nor has there been a request by Defendant to delay any scheduled hearing or deadline due to the purported lack of discovery. There is no prejudice to Defendant in that there are hundreds of potential class members with the approximate same dates of service, same job titles and duties, same supervisors, and subject to the same policies propounded by the Defendant. Given that the case will continue with or without these Potential Class Members, the public policy of favoring disposition on the merits must weigh in favor of giving these Potential Class Members a hearing on the merits. Finally, Defendant has sought no lesser sanctions from the court because it does not want the answers, it wants to avoid the answers through dismissal. An order compelling production, or the alternative and affidavit stating that no documents are in the possession or control of the Potential Class Member would be available should the court decide any remedy were appropriate.

## Summary

Defendant seeks the most drastic of remedies in an effort to deny justice. The Potential Class Members have substantially complied with discovery requests and the factors to be considered by the court in regards to the relief sought all weigh against granting the motion. Defendant's motion should be denied.

Respectfully submitted,

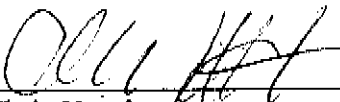
  
Christopher F. Huntley  
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CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of January, 2002, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

Kim J. Dockstader  
Gregory C. Tollefson  
STOEL RIVES LLP  
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☐ Via Hand Delivery  
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Chris Huntley